United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1660

74-1660

To Be Argued By

RUTH BALEN

UNITED STATES COURT OF APPEALS

For the Second Circuit

DOROTHY BOYD, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

and

INEZ STONEY,

Intervenor-Plaintiff-Appellee,

against

THE LEFRAK ORGANIZATION AND LIFE REALTY, INC.,

Defendants-Appellants.

On Appeal from the United States District Court

Eastern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES DOROTHY BOYD AND INEZ STONEY

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PRELIMINARY STATEMENT

Appellees Dorothy Boyd and Inez Stoney, black recipients of public assistance in New York City, commenced this action, on behalf of themselves and all others similarly situated, alleging violations, inter alia, of the Fair Housing Act, 42 U.S.C. §§3601 et seq., and the Civil Rights Act of 1866, 42 U.S.C. §1982, in the rental practices of appellants Life Realty, Inc. and The Lefrak Organization ("rental office" and "Lefrak"). Mrs. Boyd and Ms. Stoney complained that the rental office and Lefrak had 1) adhered to a practice of blanket exclusion of public assistance recipients; and, 2) applied financial criteria for admission to their apartments which excluded public assistance recipients and were not justified by business necessity; both of which practices had a markedly discriminatory racial and ethnic impact.

The rental office and Lefrak appeal from an amended judgment entered on April 29, 1974 in the United States District Court for the Eastern District of New York, after a trial before the Hon. Tom C. Clark, Associate Justice of the United States Supreme Court, retired, (sitting by designation), without a jury, which declared the financial criteria ("the 90% rule" and "co-signer requirement") used by the rental office and Lefrak to be in violation of the Fair Housing Act and the Civil Rights Act of 1866, and enjoined the rental office and Lefrak from applying the 90% rule and co-signer requirement to Mrs. Boyd and Ms. Stoney and all others similarly situated ("all public assistance recipients within the New York Metropolitan Area who have sought or may seek to rent accommodations in the residential buildings owned or

operated by the Lefrak interests" (A866).

The Court below found that:

> ...[T]he 90 percent financial rule or co-signer-guarantor substitute does not accurately measure rent-paying ability of public assistance recipients; that, as a result, public assistance recipients in New York City cannot qualify for rental of defendants' apartments; that some 77 percent of the public assistance recipients are of black or Puerto Rican extraction; and that the 90 percent rule is arbitrary and discriminatory as to public assistance recipients of New York City as a class, including those of black and Puerto Rican extraction; that there is no overriding legitimate business necessity for the 90 percent financial rule; all in violation of the Fair Housing Act of 1968 and the Civil Rights Acts aforesaid. (A845-46)

STATEMENT OF FACTS

A. Background

On August 6, 1970 an action was commenced under the Fair Housing Act, 42 U.S.C. §§3601 et seq., by the United States of America against the appellants and Samuel J. Lefrak, Reba Gelman, and Anthony Cuccia, alleging a pattern and practice of resistance to that statute (A846). United States of America v. Life Realty, Inc., et al. (E.D.N.Y.), 70 Civ. 964 ("Government's suit"). The Government's suit was concluded by a consent decree ("consent decree") by which the rental office and Lefrak agreed to comply with the Fair Housing Act, to accept applications for apartments regardless of the race of the applicant, to maintain records of applicants for apartments in Brooklyn by race, and to apply to all applicants an eligibility requirement that an applicant's net weekly income be equal to 90% of a month's rent (the 90% rule) (E149, A692, 846).

On August 13, 1971 Mrs. Boyd filed an administrative complaint

with the United States Department of Justice, pursuant to the consent decree, alleging that she had been denied a Lefrak apartment on July 7, 1971, solely because of her status as a public assistance recipient, in violation of the consent decree and the Fair Housing Act (A847).

On or about October 6, 1971, Mrs. Boyd moved to intervene in the Government's suit. The motion for intervention was denied on November 4, 1971, but the Court (Weinstein, J.) directed that the intervention papers be treated as commencing a new action in which the parties to the Government's suit were named as defendants. With leave of court, Mrs. Boyd filed an amended complaint on January 3, 1972.[1]

On December 22, 1971, an amendment to the consent decree, proposed by the parties thereto to respond to Mrs. Boyd's administrative complaint, was approved by the Court (Weinstein, J.). By the amendment, the rental office and Lefrak agreed to treat public assistance recipients seeking apartments in the same way as non-recipients, to distribute a "Notice to Welfare Recipients" (Elw) to public assistance recipients, and to accept on behalf of recipients a legally enforceable guarantee of rent by a Government agency in lieu of compliance with the 90% rule. The government guarantee provision has never been used because there have never been such guarantees available (A847-48). Although after the amendment to the consent decree, the rental office began to take a small number of applications for apartments from public assistance recipients, recipients continued to be excluded from renting Lefrak apartments.

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[1] On June 7, 1972, the government defendants were granted a dismissal of the amended complaint as to them. Boyd v. United States, 345 F. Supp. 790 (E.D.N.Y. 1972).

On May 18, 1972, a class action order was issued from the bench by the Court herein (Weinstein, J.) defining the class as "all welfare recipients within the metropolitan area who may seek accommodations in buildings owned or operated by the Lefrak interests" (A67a). Also, on May 18, 1972, Ms. Stoney was permitted to intervene, without opposition.

On March 2, 1973, the consent decree was dissolved by the Hon. Jack B. Weinstein; however, in an opinion issued with the dissolution order, the Court explicitly stated that the dissolution was without prejudice to the instant action.[2]

B. Testimony of Members of the Class

1. Dorothy Boyd

In early July, 1971, Mrs. Boyd, a black public assistance recipient in the Aid to Dependent Children category, inquired at the Brooklyn rental office about renting an apartment (A371-72, 846). At that time, Mrs. Boyd was living with her five children in "totally miserable" and "unbearable" conditions in two hotel rooms for which she paid $88.65 a week ($380 a month) (A364-67, 848). For over a year she looked for an apartment "every single solitary day" (A365, 368), but found only apartments that were worse than the rooms at the hotel (A368). Landlords "in all the better neighborhoods" rejected her because she was a public assistance recipient (A368-69, 848).

At the rental office she met and spoke with Anthony Cuccia, a rental agent, who invited her to select an apartment for inspection (A372, 847). Mr. Cuccia gave Mrs. Boyd his business

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[2] The entire court file of the Government's suit was in the courtroom throughout the trial of this action, and the Court's attention was directed to the dissolution order and opinion, and other relevant matter from time to time. (A692)

card on which he had written information about the apartment she had selected, a five room apartment renting for $265 a month (A372-75; Exhibit 8, record). She inspected the apartment that same day and decided to rent it (A376). She then telephoned the rental office and spoke with Mr. Cuccia whom she told of her decision to rent the apartment (A377).

The following conversation ensued between Mrs. Boyd and Mr. Cuccia:

> He said, "Bring in your husband's social security card, the card with the numbers on it."
>
> I said, "I know what a social security card is. I don't have my husband's social security card."
>
> He said, "Get it from your husband."
>
> I said to him, "My husband and I are separated."
>
> Then he says to me, "How are you going to pay the rent for the apartment?"
>
> I said, "I receive public assistance."
>
> He said to me, "We don't rent to welfare recipients" and he hung up the phone. (A377-78; see also A847, 737)

Mrs. Boyd was angry and upset that she had been refused the apartment because she was a public assistance recipient and sought the assistance of Ruth Balen, an attorney (A378, 847). On July 7, 1971, Ms. Balen telephoned Lefrak's main office in Queens and spoke with Mr. Richter, the vice-president for management. In response to questions, Mr. Richter stated that Lefrak did have a policy of not renting to public assistance recipients (A441-42, 847).

Mrs. Boyd was living in an apartment in Far Rockaway, New York, at the time of trial, renting for $260 a month (A379, 848). It had no heat or hot water, and was a great distance from the

City, making travel very expensive (A380, 848).

2. Inez Stoney

In March, 1972, after the amendment to the consent decree, Inez Stoney, a black public assistance recipient, inquired at the Brooklyn rental office about renting an apartment (A31, 848). After having been reassured by a woman answering the telephone at the rental office that Lefrak would rent to public assistance recipients "who could meet the demands" (A34), Ms. Stoney went to the rental office and spoke with Mrs. Gelman, an agent there (A35). Mrs. Gelman permitted Ms. Stoney to inspect a five room apartment renting for $295 a month (A35-36). Ms. Stoney decided to rent the apartment and the next day returned to the rental office (A36). There she was told by Mrs. Gelman to bring in a co-signer for the lease earning $300 a week (A36-37, 849).

A few days later, Ms. Stoney returned to the rental office with a friend to act as co-signer who earned $200 a week (A37-38, 849). Ms. Stoney was not permitted to make an application for the apartment or leave a deposit because her co-signer's income was insufficient (A37-38, 849). About three or four days after her first visit to the rental office, Ms. Stoney learned that the apartment was still vacant and returned to make another attempt to rent the apartment (A39-40). She was told the apartment had been rented the day before (A40),[3] although it was not.

3. Shirley Lee

In December, 1971, after an article appeared in a newspaper

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[3] An application for the apartment was taken by the rental office after Ms. Stoney's first two attempts to rent the apartment but the apartment was not rented to the applicant (E300, A717, 733).

announcing that Lefrak would rent to public assistance recipients, Shirley Lee, a black public assistance recipient, went to the rental office in Brooklyn to inquire about renting an apartment (A65-66, 849). She spoke to Mr. Cuccia who assured her that Lefrak would rent to recipients (A66). Mr. Cuccia permitted Ms. Lee to inspect a four room apartment renting for $235 a month (A849). Ms. Lee decided to rent this apartment and returned to the rental office where Mr. Cuccia told her to obtain a co-signer, either the Welfare Department or an individual (A68, 76, 849). The Welfare Department was unwilling to act as a co-signer, but a friend of her mother's, whom she knew slightly, consented to do so (A68-70). Ms. Lee was then permitted to make an application for the apartment, but was rejected when a credit investigation revealed that her co-signer had lied on his application (E15a, A69, E298, A740, 849). The amount of her own income was not explored, either on the application or on the credit report.

C. The Class

1. Population Characteristics

In 1970, the Census found that there were 735,513 public assistance recipients in New York City, 77% of whom were black and of Puerto Rican birth or parentage (E1a, judicial notice taken, A8, A845). 20% of the City's black population, 29% of the Puerto Rican population, but only 3% of the non-black, non-Puerto Rican population received public assistance (A851).

Since there was rapid growth in the public assistance population in New York City after the 1970 Census was taken, rising to 1,275,269 in November, 1972 (Exhibit 22, record, A315), more current data on the ethnicity of the public assistance population

was introduced. In 1971, a study of the portion of the public assistance population receiving Aid to Dependent Children ("ADC") showed that ADC recipients were 9.9% white, 45.4% black, 37.7% Puerto Rican, 6.3% other Latin American, and 0.7% Oriental or American Indian (Elr, judicial notice taken, A12). Then, and until January, 1974, ADC recipients accounted for between 70 and 75% of the public assistance population (Exhibit 22, record, A315). Using 1970 population data and the data from the 1971 ADC study, one finds that in 1971, 25% of the black population and 42% of the Puerto Rican population in New York City received public assistance in the ADC category alone[4] (Ela, Elr).

In Goodwin v. Wyman, 330 F.Supp. 1038, 1039 (S.D.N.Y. 1971), aff'd per curiam 406 U.S. 1964 (1972), the New York City and State Departments of Social Services admitted that the categories ADC and Home Relief ("HR") were predominantly black and Puerto Rican, the category Aid to the Disabled ("AD") was approximately half white and half black and Puerto Rican, and the categories, Old Age Assistance ("OAA") and Aid to the Blind ("AB") were predominantly white. If one takes into consideration the ethnicity of the categories of assistance other than ADC, together with the 1970 population data, late 1972 public assistance data, and 1971 ADC ethnicity data, one obtains an estimate that by 1973, approximately one-third of the black and one-half of the Puerto Rican population of New York City received public assistance, while only 5% of the white population did so (Ela, Elr; E22, record, A315, A851).[5]

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[4] In 1971, there were five categories of public assistance. See New York Social Services Law §§157 et seq. (McKinney's)

[5] This estimate is based on the assumption that the population of New York City did not change significantly since 1970.

On January 1, 1974, the federal categories of assistance, OAA, AB and AD were abolished and replaced with a new federal program, Supplemental Security Income ("SSI").[6] Title XVI, Social Security Act, 42 U.S.C. §§1381 et seq. OAA, AB and AD had accounted for 16% of the public assistance population of New York City, and nearly all of the white recipients (Exhibit 22, record; A315). The remaining ADC and HR recipients are now at least 85% black and Puerto Rican.

2. Housing Characteristics

In 1970, 80.7% of the public assistance population lived in the City's poverty areas (Exhibit 3, record; judicial notice taken, A11, A851). Their housing is the oldest and worst-maintained (Exhibit 3; A432, 416). Less than 3% of all post-1929 buildings are occupied by recipients (A415-416). In their housing, recipients are intensely segregated, and racial and welfare recipiency status discriminations by landlords were found by Dr. Indik, a witness for appellees, to be factors in this segregation (A408-409, 411, 425; E25, E26, A429). In 1969, three-quarters of the buildings inhabited solely by whites had no welfare tenants. Less than half of the all-black buildings and less than a quarter of the all Spanish buildings had no welfare recipients (A413, E1, E2, A431, 432, 852). Recipients' concentration in poverty areas is increasing even while the population density of those areas

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6. SSI recipients receive a grant consisting of a federal allowance and a state supplementation, while continuing to receive services (non-cash assistance) as they had in the OAA, AB, and AD categories. New York Social Services Law, §131-a (McKinney's)

is decreasing (A411). Dr. Indik concluded that:

> . . . [T]he concentration of welfare recipients indicated. . . earlier and the continuation of this kind of process might well lead us to a welfare society; that is, specific areas of this city that are almost completely welfare recipient communities (A427).

D. Lefrak's Rental Practices

1. Generally

Lefrak rents 15, 484 apartments in 119 buildings located throughout New York City (A841, 854; E8, A461). Except for three state-subsidized projects, the same rental practices have been in effect for all buildings (Deposition of Alvin Moskowitz, p. 53 introduced in lieu of testimony pursuant to Rule 32(a)(2), Federal Rules of Civil Procedure, A16-17). At all times relevant to this litigation, Lefrak apartments were rented through the Life Realty, Inc. offices in Brooklyn and Queens (A524A).

Prior to the Government's suit, Lefrak had used an income requirement that an applicant, or applicant and spouse, have net weekly income equal to a month's rent.[7] This requirement was applied flexibly in favor of applicants who could show job stability (A527; Deposition of Alvin Moskowitz, pp. 29-31 introduced in lieu of testimony, A16-17). Because the flexibility of the rule in application allowed for racial discrimination, the Government, when negotiating the consent decree, demanded that

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7. Although Mr. Richter testified that this standard utilized gross income (A525), testimony at a deposition of a Lefrak managing agent made clear that net income had always been used, before and after the consent decree. Deposition of Alvin Moskowitz, pp. 29-30 (introduced in lieu of testimony, A16-17).

the income requirement be rigidly defined and applied.[8] (Government's suit, transcript of hearing, December 22, 1971, p. 11). Thus, the consent decree included the present rule, the 90% rule enjoined by the Court below.

The 90% rule is that an applicant, or applicant and spouse, must have net weekly income equal to 90% of a month's rent (A525). It differs from the prior requirement only in requiring slightly less income (to meet 90% of monthly rent instead of 100% of monthly rent). To arrive at net income all taxes, fixed obligations and debts are deducted from gross income (consent decree ¶¶ V.C.1, V.C.4, E153-154).

Unchanged by the consent decree was the co-signer requirement. Under this requirement an applicant whose income was insufficient to meet the 90% rule could still qualify for an apartment if he were able to obtain a co-signer of his lease (Admission, B57; Deposition of Reba Gelman, pp. 10-11 introduced in lieu of testimony, A16-17). The co-signer is treated differently from the applicant in that his spouse's income is not taken into account, and he must earn 110% of a month's rent in a week (based on net income)(A542, 543; Deposition of Reba Gelman, p. 10, introduced in lieu of testimony, A16-17, A850-51). The co-signer's own rent is treated as a fixed obligation and deducted (Deposition of Alvin Moskowitz, pp. 32-36 introduced in lieu of testimony, A16-17). The income required of the co-signer is therefore

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8. The assertion by appellants that this term was negotiated to make it easier for people who pay no taxes to qualify for apartments is unsupported by the record (Brief, p6). Obviously, people who pay no taxes have income insufficient to meet the 90% rule.

considerably in excess of that required of the applicant (A850-851).

The rental procedure begins when an interested person visits one of the rental offices. On the first visit, the potential applicant is questioned about his preferences in apartment size and location, and then is invited to inspect one or more apartments (A713). If the potential applicant decides to rent an apartment he has inspected, he returns to the rental office to make an application (A713).

On the return visit, the potential applicant is questioned extensively about his income, and no application or deposit is taken unless he demonstrates he has sufficient income to meet the 90% rule (A714; Deposition of Reba Gelman, p. 10, introduced in lieu of testimony, A16-17, A849-50). If his income appears to be insufficient, the potential applicant is told to obtain a co-signer and return to the rental office with him. (Deposition of Reba Gelman, pp. 10, 14, introduced in lieu of testimony, A16-17, A850). Then, only the potential applicant who returns with a suitable co-signer is permitted to make an application (Deposition of Reba Gelman, p. 19, introduced in lieu of testimony, A16-17; A850).

The application forms themselves are filled in by the rental agent (A726). If at any time during this process, the co-signer's (or applicant's) income appears to be insufficient the application forms are destroyed (Deposition of Reba Gelman, p. 33, introduced in lieu of testimony, A16-17). A deposit is taken for those applications that are completed and they are sent to a credit agency where an investigation is made into the applicant's (and

co-signer's) credit background, history as a tenant, and employment (A713,714, 525, 569, 850). If the credit report is positive, a lease is signed (A540).

2. As to Public Assistance Recipients

The treatment of public assistance recipients by Lefrak has been different from the normal rental procedures. In July, 1971, if not before, Lefrak adhered to a policy of blanket exclusion of recipients (A847). The reason given for this policy was a fear that recipients would create maintenance problems (A443,847). Thus, as was the case with Mrs. Boyd, recipients were rejected at the point when their status was revealed.

After the amendment to the consent decree, the stress in the application procedure for public assistance recipients was on obtaining a co-signer (A850). For the remaining fourteen months of the consent decree, when hundreds of Lefrak apartments were rented in Brooklyn and Queens,[9] only ten were rented by public assistance recipients, all with co-signers (Exhibit 24, record). No records were kept of the number of recipients who sought to rent apartments but never reached the application stage. However, Mrs. Gelman, the manager of the Brooklyn rental office, said that she had distributed 50-100 of the Notice to Welfare Recipients by February, 1973, yet only seven recipients applied for apartments through her office (Exhibit 24, record; Deposition of Reba Gelman, p. 12, introduced in lieu of testimony, A16-17).

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9. 1,292 were rented in Brooklyn alone between February, 1971 and January, 1973 (E148).

In the application procedure itself, little or no effort was made to determine the income of recipients, whether from benefits or earnings (A728,729,730). Ms. Lee's application, for example, was blank in the income section except for the words "Social Service" (E15a, A858). The tenor of the testimony of the Lefrak witness on this difference in treatment of recipients' income was that it was assumed to be insufficient, although the witness did not know what that income was (A725, 728,729,730).

E. Rent-Paying Ability of Public Assistance Recipients

Public assistance recipients[10] receive a grant issued semi-monthly to meet shelter and other needs (A344, 858). New York Social Services Law §131-a (McKinney's). The amount they receive for food, clothing, and other non-shelter needs is fixed by statute and is based on a statewide "standard of need".[11] Shelter needs (rent) of the recipient household are met on an "as paid" basis, i.e., whatever the household actually pays for shelter, and there are no upper limits on this portion of their grant (A337, 858-59).

A recipient obtains a shelter allowance by first locating an apartment to rent, and then requesting approval of the rental from the New York City Department of Social Services ("DDS"); how-

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10. The following discussion does not apply to SSI recipients.

11. Appellants rely on the fact that ADC and HR recipients received 90% of the statewide standard of need for several years prior to 1974. (Brief p.7). On January 1, 1974, ADC and HR recipients began receiving 100% of the standard of need (New York Social Services Law §131-a, as amended) and in July, 1974, they received a further 12% increase (18 N.Y.C.R.R. §352.2), a 22% increase in income so far this year.

ever, approval is not given until a landlord has agreed to rent a particular apartment to the recipient[12] (A335-338, Exhibit 23, record).

Once an apartment has been rented to a recipient, provision is made by DSS for the possibility that the recipient might fall into arrears in rent. When a recipient is in arrears, and DSS is notified by the landlord informally or formally in a dispossess ("Notice of Petition and Petition commencing a Summary Dispossess Proceeding for Non-Payment of Rent"), DSS will advance the amount of the rent arrears to the recipient (A341). Thereafter, the shelter allowance will be issued in "two-party check" form, in a check made out to the recipient and the landlord (A340). DSS may also pay the rent directly to the landlord in the form of a "vendor" payment. New York Social Services Law §131-a(7)(McKinney's).

Dr. Tobier, an economist and witness for appellants, testified that these provisions for the defaulting recipient would, indeed, provide greater assurance to a landlord of rent payment than in the case of a working, non-recipient family (A616).

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12. For this reason, the grant of a recipient applying for an apartment renting for more than the housing he then had would not reflect the income actually available to him and a landlord who looked to current income would reject him. This is the "merry-go-round" problem noted by this Court in Male v. Crossroads Associates, 469 F. 2d 616, 622 (2nd Cir. 1972). However, in this case, the recipient entitled to receive an increased shelter allowance would still be rejected by Lefrak because his total income could not meet the 90% rule.

The 90% rule is based on an aggregation of the total income of an applicant, and attempts to measure the ability of the applicant to pay rent based on the ratio of the rent to this aggregate income. However, a recipient's ability to pay rent can be measured only by the shelter allowance provided to him by DSS. Thus, Dr. Tobier testified on the applicability of rent-income ratios to recipients:

> Q. From what you told us concerning the method of paying shelter costs for welfare recipients, isn't it true that rent income ratios have no meaning in the normal market sense in that the rent is paid separate[ly] in whatever amounts the recipient has to pay for rent?
>
> A. Yes. It's true. I mean, right. (A626)

The theory underlying the use of a rent-income ratio is that a family spending a disproportionate share of its income on rent has less to spend on other necessities and becomes a risk to its landlord because of the resulting financial bind (e.g., Brief p. 10).[13] Such a theory, if it has any substance at all, applies only to working families. First, unlike the working person, no matter how much a recipient spends for rent, he continues to receive exactly the same amount for his needs other than rent. New York Social Services Law §131-a. Second, recipients receive numerous non-cash benefits which allow them to stretch their budgets beyond the dollar amount of their grants. Recipients pay no taxes, they receive totally free medical care ("Medicaid"), and food stamps which allow them to buy more

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13. Therewas no evidence introduced that a family paying a disproportionate share of its income for rent is actually likelier to default.

food for less money (A857-58). New York Social Services Law §§363, et. seq.; Title 18, New York Code of Rules and Regulations ("N.Y.C.R.R."), Part 435; IRS Optional Tax Table.

Third, a recipient who exceeds his budget does not sacrifice any needs in doing so, as a working person might.[14] New York Social Services Law §131-a; 18 N.Y.C.R.R. §352.7(g).

Appellants claim that when DSS advances rent arrears to a recipient, the amount of the advance is "recouped" from the recipient's future grants thereby placing him in a financial bind[15] (Brief, pp.7-8). This recoupment is made at the rate of 10% of the semi-monthly non-shelter grant, or less. 18 N.Y.C.R.R. §352.31(d). The financial bind alleged to result from a recoupment was never shown by appellants to have any relevance to the case at bar. Putting aside the fact that rent would be issued by two party checks during recoupment (18 N.Y.C.R.R. §352.7(g)(7)) no evidence was introduced on the frequency of defaults in rent by recipients (and thereby the likelihood of advancement and recoupment). Nor did appellants show why their investigation of

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14. It is possible for an adult ADC recipient to work and still receive public assistance. In such a case $30.00 and 1/3 of the remainder of his net monthly income are disregarded. 18 N.Y.C.R.R. §352.20(2). Since this income disregard is computed on the basis of net income, the amount spent on taxes is also disregarded. Babysitting expenses, carfare and lunches for that recipient are met by special grants. 18 N.Y.C.R.R. §352.19. At the same time, the working recipient continues to receive food stamps, Medicaid and all other benefits.

15. The procedure of recouping in such circumstances was found to be in violation of the Social Security Act. NWRO v. Weinberger, 372 F.Supp. 1196(DDC, 1974), and is barred by a new federal regulation, 45 CFR §233.20(a)(12). In addition, the procedure is presently under review in this Circuit. Hagans v. Lavine, _____ U.S. _____, 42 U.S.L.W. 4381 (March 26, 1974).

the tenancy history of a recipient would not protect them against recipients likely to default. The evidence, however, raises an inference contradictory to appellants' claim. In 1972 there were 461 recipient households in Lefrak apartments, and 480 in 1973 (E8,12) Yet, for the 15,484 apartments, 108 dispossesses were issued in 1972 and 43 in 1973 (Admission B83; A839). Further, appellants admit they had not knowledge of the presence of recipients in their apartments until they were informed by a third party (A558), supporting the inference that recipients were not problem tenants.

Appellants complain that DSS does not pay rent directly to the landlord, but they introduced no evidence to show that landlords are harmed thereby (Brief, p7). They complain that the portion of the grant intended for rent is not set apart to prevent the recipient from spending it on something else, but offered no evidence to show why such a procedure is necessary. (Brief,p7) They complain that DSS does not stop recipients from breaking leases[16] (Brief, p.8) and again, supply no basis for drawing the conclusion that recipients are bad risks. By these claims, appellants demonstrate that they are operating on the presumption that all recipients are unreliable, untrustworthy and bas risks, a presumption that is itself suspect.

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16. This is no longer true. DSS does not permit a recipient to move more than once in two years, the term of most leases and Lefrak leases, except under extraordinary circumstances. Income Maintenance Memo # 234/73, 10/17/73 (Income Maintenance Memos are policy statements issued by DSS, A338).

F. The Statistical Evidence

1. The 90% Rule as a Rent-Income Ratio

Appellants' expert witnesses testified that a 25% rent-income ratio was generally used in the rental housing industry for the purpose of measuring rent-paying ability (A635-637, 658). The 25% rent-income ratio stated in words is that 25% of a prospective tenant's gross income should be equal to one month's rent. There is no data in existence to demonstrate that the 25% rent-income ratio is generally applied, necessary, or desirable as a method of measuring rent-paying ability; however, one prominent study referred to it as the "rule of thumb" and found it a poor determinant of rent-paying ability[17] (A132). Rental Housing In New York City, Volume II, The Demand for Shelter, R-649-N.Y.C., June, 1971, pp.130-146 ("Rand Study"). The 1970 Census on Housing shows that 39.1% of all rental households in New York City exceed the rule of thumb in their rent income ratios. (Elk; judicial notice taken, A9; E7, A125).

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17. Appellants refer to two occurrences of the figure 25% in federal housing programs (Brief, p.9). See 12 U.S.C. §1715z-1(f); 42 U.S.C. §1402(1). In the "§236" program a tenant must spend 25% of his income for rent, and in the public housing program, a tenant may not be asked to spend more than 25% of his income for rent. In both programs, the 25% limitation provides the method for setting rents, not for determining the eligibility of applicants. When a rent-income ratio was attempted for §236 housing to determine eligibility it was struck down as failing to measure rent-paying ability. Findrilakis v. The Secretary of the Department of Housing and Urban Development, 357 F.Supp. 547 (N.D. Calif., 1973).

The 90% rule is an inverted rent-income ratio (A98). Instead of measuring rent to income, the 90% rule measures income to rent (A98). In order to utilize Census data on rent-income ratios and to effect a comparison to the rule of thumb (which appellants claim is equivalent to the 90% rule) Dr. Bickel, appellees' expert witness, converted the 90% rule to a rent-income ratio (A98-99). If based on gross income, Dr. Bickel found that the 90% rule is the equivalent of the rule of thumb (A99). However, in actuality the 90% rule is based on net income (gross income, less taxes, obligations and debts) and therefore it was necessary to further convert the 90% rule to a rent-gross income ratio (A99). In this computation, only taxes were deducted from gross income, yielding a conservative figure (A101). Dr. Bickel found that the 90% rule almost precisely converted to a 20% rent-income ratio (A100), but if all deductions were made the 90% rule might be equivalent to a rent-income ratio as low as 17% (A101, 857).[18]

It is, of course, apparent that a 20% rent-income ratio is considerably more stringent than a 25% rent-income ratio. The 1970 Census shows that 50.5% of New York City renter-households exceed the 90% rule, as opposed to 39.1% exceeding the rule of thumb (Elk; judicial notice taken, A9; A102; E7, A125; A857). 56% of renter-households renting apartments in Lefrak's rental range

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18. Dr. Tobier's testimony that the 90% rule converted to a 22% rent-income ratio was discounted by the Court below as "on the witness chair" calculation (A857,645).

exceed the 90% rule (E7).[19]

These facts support the inference that neither the rule of thumb nor the 90% rule is generally applied in the real estate industry, and a very large number of landlords in New York City accept tenants who exceed those limits.

2. The Effect of the 90% Rule

Dr. Bickel analyzed the 90% rule to determine how it actually operated in terms of eligibility and exclusion[20] and, what, if any, racial effect it has. In doing this analysis, the 90% rule was used in conjunction with Lefrak's occupancy standards and rentals (A105). First, Dr. Bickel sought to determine the eligibility and exclusion of renter-households in New York City for average price, minimum size Lefrak apartments. Then, he sought to determine eligibility and exclusion for minimum price, minimum size Lefrak apartments (A106,112). While, as Dr. Bickel testified, the average price analysis yielded the most accurate eligibility and exclusion rate, the minimum price analysis was done to meet the objection that renters would seek the cheapest apartments (A111).

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19. The rental range was drawn from listings of vacancies for July, 1971 to September, 1971, stipulated to be accurate by appellants (Exhibit 6, record, A12; A839). Dr. Bickel testified that the least expensive apartment rented for $140.00 with the rent escalating from there (A103). In drawing a sample of rentals for statistical purposes, he found that a rental range of $150-300 would account for 99.3% of the apartments listed (A103).

20. Those excluded are households who cannot possibly qualify under the 90% rule (A295).

Dr. Bickel found that the minimum income required to meet the 90% rule is $10,500 (for an efficiency apartment) to $20,400 (for a three bedroom apartment)(E4, A125). For white renter-households the eligibility rate is 24.1%, and the exclusion rate 75.9% (E4, A125). For black households, the eligibility rate is 5.8% and the exclusion rate is 94.2% (E4, A125). For Puerto Rican households, the eligibility rate is 2.6% and the exclusion rate is 97.4% (E4, A125). 95.2% of black and Puerto Rican households are excluded (A109). The same differential was demonstrated in the analysis of eligibility for minimum price apartments (A112; E6, A125). Even when the 90% rule was applied only to the upper income half of the population, 51.4% of white households were eligible, but only 14.8% of black households, and 6.4% of Puerto Rican households (E6, A125).

Based on this analysis, the eligibility of white households is five times as great as black and ten times as great as Puerto Rican (E6, A125).

Dr. Bickel concluded:

> . . .[T]he impact of the 90% rule as it is actually used in combination with the occupancy standard, is quite stringent, quite severe and quite heavily differentiated as between white households and black and Puerto Rican households (A113).

Finally, Dr. Bickel testified concerning the reasonableness of the 90% rule as applied to test rent-paying ability. Dr. Bickel's opinion was as follows:

> The degree of stringency in the proportion of the population that is excluded by this rule, the way it actually operates, is so severe and so high, I'm unable to imagine on general grounds of business financial cost of operations and so on, how it would be justified to that degree of stringency (A126-127; A299-300).

Dr. Bickel's opinion was based, in part, on a Rand Institute study[21] that produced a formula with which to determine a rent-income ratio that would assure an adequate return to the landlord (A127). Dr. Bickel applied the Rand formula to Lefrak rentals and eligible renter-households, and found that "a 37% rent-income ratio would permit a family to increase (meet) the cost of its basic necessities as well as to. . .cover Lefrak rents as they present[ly] exist" (A132). Converted to an equivalent of the 90% rule, the Rand Institute formula, as so applied, yielded a 49.5% rule (A132). Put in words, a potential renter would only have to earn, net, 50% of a month's rent in a week to assure the payment of rent.

Appellants offered no evidence to contradict Dr. Bickel's testimony of the effect of the 90% rule. They offered no evidence on the justification of the 90% rule, other than this testimony of Dr. Tobier, their expert:

> As far as I know, it really is a rule of thumb that extends well back into, you know, into the housing literature and its sort of similar ratios show up a hundred years ago in western Europe and in the United States throughout most of, you know, in the history of budget studies and it keeps reappearing and it has been used for a very long time (A648; A635).

3. The Ethnicity of Lefrak Buildings

Data compiled by appellants showed that during the consent decree, from February, 1971 to January, 1973, 630 leases were entered into with blacks for apartments in Brooklyn, and 662 were entered into with whites (E148, A531). Appellees introduced a breakdown of this data relied on by appellants (stipulated to for accuracy) which showed that even though nearly half of the

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21. Rental Housing in New York City, Volume II, The Demand for Shelter, R649-N.Y.C., June, 1971.

available apartments were rented to blacks, during the two years of the consent decree, blacks still were rejected two-four times as frequently as whites[22] (E23, A694).

Appellees also introduced a study done by the New York City Human Rights Commission ("Commission study") of Lefrak buildings in Brooklyn in 1969, just before the commencement of the Government's suit (E27, A786). This study showed that there were 286 black tenants and 93 Puerto Rican tenants in Lefrak buildings in Brooklyn. 37 of the 51 buildings surveyed were ethnically segregated. All but 16 of the black tenants lived in 9 buildings. Overall, 6% of the tenants were black and 2% Puerto Rican. Blacks constitute 21% of the population of New York City and Puerto Rican 10% (Ela, jduicial notice taken, A8).

During the consent decree there was, indeed, a sharp increase in the number of apartments rented to blacks, with 13% of the 4,642 apartments in Brooklyn rented to blacks. The most generous computation would show that the percentage of blacks in Lefrak buildings in Brooklyn thereby rose to 19.8% (A855). However, that estimate is based on the dubious assumption that none of the 286 black tenants in 1969 moved out between 1969-73 (and, if some moved out between 1969-71, they were replaced by other black tenants). It is more likely that at least some black tenants moved out during the critical period, a factor that would lower the percentage of blacks renting Lefrak apartments by the end of the consent decree.[23]

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22. In this breakdown, based on an examination of individual applications, applications by Spanish-surnamed were insignificant in number.

23. There is no ethnicity data for Lefrak buildings post-dating the consent decree.

No data was available on the ethnicity of Lefrak's buildings in Queens, since none was required by the consent decree, and no pre-consent decree study was done.

4. Public Assistance Recipients Applying for Lefrak Apartments

The only data available concerning applications for Lefrak apartments by public assistance recipients is for the period after the amendment to the consent decree, December, 1971 to the dissolution of the consent decree, January, 1973. During this period twenty recipients completed applications for apartments in Brooklyn and Queens[24] (Exhibit 24, record A22). Ten of the twenty applicants were accepted with co-signers. Ten of the applicants were white and ten were black.[25] Two of the white applicants had Spanish surnames. Of the white applicants, 70% were accepted and 30% rejected. Of the black applicants (exclusive of those who cancelled; none of the white applicants did so), 33 1/3% were accepted and 66 2/3 rejected. Of black and Spanish sur-named, 38% were accepted and 63% rejected. All of the white applicants had white co-signers. All but one of the black had black co-signers (A853-54). Thus, the whites accepted ran more than two to one over blacks and the race of the co-signer clearly affected this result (A854).

This data confirms the racial impact of Lefrak's 90% rule and

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24. Twenty applications is an admittedly small sample and it is difficult to draw conclusions from it. However, the data from this sample agrees with the other statistical evidence (infra); and, to the extent that the twenty represent the end of a process by which recipients were excluded in large numbers before reaching the application stage, it may be considered significant.

25. The application forms had space for only black and white racial designations (E221).

co-signer requirement, and supports the inference that even among recipients who reached the application stage, there was differentiation highly related to race.

5. Welfare Tenancy of Lefrak Buildings

DSS records showed that in November, 1972, 461 recipients lived in Lefrak buildings; and, in May, 1973, 480 lived in Lefrak buildings (E8, E12, A335). All the evidence supports a presumption that most of these recipients entered Lefrak buildings as non-recipients, and Lefrak's managers were not aware they were there (A322-324). Mr. Richter testified that he found out about the welfare recipiency in Lefrak buildings "a year or two ago" when he "was given a list" (A558).

The number of Lefrak-issued dispossesses for non-payment of rent, an indication of the degree of rent-paying ability of Lefrak tenants, were 108 in 1971 and 43 from January, 1972 to August, 1972 (Admission, B83, A839). If all 43 dispossesses in 1972 were accounted for by recipients, an occurrence so striking that one would suppose Lefrak to know of it, only 9% of the recipients in Lefrak buildings would have been affected. The inferences that follow from this data are that recipient-tenants in Lefrak buildings, as a group, demonstrated rent-paying ability in line with non-recipient tenants, and were not a problem to Lefrak.

G. The Findings of the Court Below are Supported by the Record

1. Appellants maintain that the Court below erred in finding that appellants' 90% rule takes into account none of the non-cash income of welfare recipients, while non-recipients are cautioned to add every item of income, including non-cash bonuses included in group health insurance policies (A858). The testimony of Mr.

Cuccia, a real estate salesman employed by the rental office, was the only testimony which dealt in detail with the procedure of filling out the application. Mr. Cuccia testified that the employees of the rental office filled out the application, and entered on it information volunteered by the applicant in response to specific questions (A726). When asked what he wrote on the application when informed that an applicant was a recipient of public assistance, he replied: "I simply put down "welfare" or "Social Service""(A728). On the application of Ms. Lee, Mr. Cuccia had written "Social Service" (E15a). He testified he only "sometimes" noted the amount of benefits on the application (A728). And, when it came to non-cash benefits, he testified he did not know what they were and did not note them on the applications unless applicants asked him to, which never occurred (A728-729). The credit report on Ms. Lee's application showed that no sources of income, other than an unspecified amount of public assistance, had been developed (E298).

By contrast, when interviewing a working person, Mr. Cuccia testified he explained the "other income" section of the application as follows:

> Whenever the question is raised, such as bank account, stocks, bonds, what have you, to let me know whatever income there might be in the family so I might put it down.
>
> Q. And the ordinary applicant understands and normally gives it to you?
>
> A. Normally gives it to me (A728-9).

Later he testified as to the benefits flowing to a non-recipient family from a union-sponsored medical plan, and stated that he had noted that item on applications (A743).

Appellees contend that Mr. Cuccia's testimony supported the inference drawn by the Court below that the income of the welfare recipient, in effect, was dismissed out of hand as insufficient, while the income of the working family was carefully explored and gone over to enhance the possibility of acceptance.

2. Appellants maintain that the Court below erred in finding that appellants' apartments have rental rates running from $150.00 to $300.00 per month (A854). According to the testimony of Dr. Bickel, based on lists of vacancies stipulated to be accurate by appellants, 99.3% of Lefrak apartments available for rental from July, 1971 to September, 1971 were in the range of $150.00 to $300.00 (A103). Mr. Richter testified that there had been no changes in these rents (A537). That the Court overlooked .7% of the rents for Lefrak apartments is not a material error.

3. Appellants maintain that the Court below erred in finding that appellants "produced no evidence as to the ethnicity of their buildings in other boroughs, including Queens" (A855). Mr. Richter's testimony on this question was self-described as "my rough estimate" and "pure guess work on my part" (A577). Mr. Meyer's testimony was based on occasional meetings with tenant groups and infrequent walking tours through the grounds of certain buildings (A706-8). He was unable to say whether the people he saw and met were tenants of these buildings. When asked how many of the apartments in Lefrak City were rented to blacks and Puerto Ricans, he replied, "I don't know the figures. I'm sorry" (A706). The Court concluded:

> The Court finds this testimony speculative and gives it little weight (A856).

Appellees contend there was ample support for this finding.

4. Appellants maintain that the Court below erred in finding that testimony given by Ruth Balen that she had called Jerry Richter of Lefrak Management and that Mr. Richter told her that appellants had a policy against renting to welfare recipients because of a fear of maintenance problems "stands uncontradicted" (A847). This finding of the Court, in context in the opinion, was addressed to the entire testimony of Ms. Balen concerning the conversation with Mr. Richter. Mr. Richter's testimony concerning this conversation was, in part, as follows:

> Q. Did that conversation ever take place?
>
> A. I don't know (A544).

This testimony was followed by:

> . . . [I] may very well have discussed our economic standards with Miss Balen and anybody else on the phone.

The portion of Mr. Richter's testimony to which this Court's attention is directed as contradicting Ms. Balen's consists of speculation about what Mr. Richter might or might not have said had he had such a conversation. Appellees contend that the Court below was justified in dismissing this speculative testimony in light of the fact that Mr. Richter had no recollection whatever of the conversation.

5. Appellants maintain that the Court below erred in finding that appellants kept no records as to the classification of their tenants by race, except during a fourteen month period covered by the consent decree (A853). The evidence to which that finding was related was that concerning the applications of public assistance recipients, records of which were kept for only a four-

teen month period. In that context, appellees contend that the error in this finding was not a material one.

6. Appellants maintain that the Court below erred in finding that: "It is difficult, if not impossible, for the average black or Puerto Rican applicant to secure a white guarantor. . ."(A851). Appellees respectfully suggest that this finding might very well be considered a matter of common sense, or a matter for judicial notice.

H. Appellants' Assertions of Facts Unsupported by the Record

1. Appellants' assertions that Mrs. Boyd was rejected for a Lefrak apartment because of over-occupancy is not supported by the record (Brief, pp. 3,4, 40). Mrs. Boyd testified in great detail about her encounter with Mr. Cuccia at the rental office, that he had given her his business card (Exhibit 8, record), and had rejected her because of her status as a public assistance recipient[26] (A371-378). Ms. Balen confirmed that Mr. Cuccia was acting according to Lefrak's policy (A441-443). Mr. Cuccia and Mrs. Gelman, agents in the rental office visited by Mrs. Boyd, both testified they gave their business cards to the people they dealt with (A713,755).

Mr. Cuccia had no recollection of Mrs. Boyd (A723). Mrs. Gelman, an elderly woman who had worked at the rental office for eighteen years, testified that she had been the one who dealt with Mrs. Boyd, had given her her business card, and had rejected her for over-occupancy (A745,746,747,755). On cross-examination, it was revealed that Mrs. Gelman could not remember what Mrs. Boyd looked like ("dark, heavy", A755), and to a series

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26. Mrs. Boyd did not see any sign concerning occupancy standards (A382-383).

of questions calling for details of the alleged incident involving Mrs. Boyd, Mrs. Gelman replied,"why not?" (A755,757). Since Mrs. Gelman claimed to have remembered Mrs. Boyd because she gave her a rough time (A746), Mrs. Gelman was asked:

> Q. In 1970, do you remember how many people gave you a rough time?
>
> A. I can remember many, many people are very, very nice (A757).

Appellees submit that the only evidence contradictory to Mrs. Boyd's testimony about the rejection was this totally incredible, even incomprehensible, testimony of Mrs. Gelman. Therefore, the Court below's finding that Mrs. Boyd was rejected because she was a public assistance recipient was supported by the record (A847), and appellant's assertion that she was rejected for overoccupancy was not.

2. Appellants claim that appellees admitted that their buildings were "fully" integrated (Brief, p.6). While they seem to find support for this claim in the record (A50,51), they, in fact, rely on a sentence in appellees' trial brief. There it was stated that appellants' buildings were "for the most part" integrated. It is clear that a trial brief is argument, and nothing more. It did not constitute an admission that appellants' buildings were integrated to any degree. Moreover, the weight of the evidence, as discussed infra, is contrary to any such assertion.

3. Appellants claim that two-party checks issued by DSS are "often" not received by landlords (Brief, p.7). There was no evidence whatever to support such a claim. The only testimony even remotely related to this question was given by Roger Starr,

who was involved with a non-profit group that managed a sixteen-unit apartment building (A670-671). Mr. Starr testified that the managing agent of this building told him it was so hard to obtain a two-party check from DSS that he had given up trying (A684-685).

POINT I

THE COURT BELOW DID NOT ERR IN FINDING A VIOLATION OF THE FAIR HOUSING ACT IN APPELLANTS' RENTAL PRACTICES.

The Civil Rights Act of 1968, 42 U.S.C. §§3601 et seq. ("The Fair Housing Act") provides that:

> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C., §3601.

And declares that it shall be unlawful:

> to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion or natural origin. 42 U.S.C., §3604(a)

The purpose of the Act was "to replace the ghettos by truly integrated and balanced living quarters " (citing 114 Cong. Rec. 3472); and the Supreme Court has held that the Act was entitled to "generous construction" to achieve that end. Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205, 211, 212 (1972).

The Court below held that:

> The requirements of the Act are not limited to intentional acts of racial discrimination but preclude "insidious and subtle" practices having a racial effect (A861).

And concluded that "there can be no doubt but that the defendants' 90 percent financial rule operates as 'built-in headwinds for minority groups', Griggs v. Duke Power Co. 401 U.S. 424 (1971) and violates the Fair Housing Act of 1968" (A861).

In this case, the racial effect of the 90% rule lies in the exclusion of nearly the entire black and Puerto Rican population of New York City, and the total exclusion of public assistance recipients, who represent as much as 1/3 of the black population and 1/2 of the Puerto Rican population of the City, from the opportunity to rent Lefrak apartments (A851, 853). While 94.2% of the black population and 97.4% of the Puerto Rican population is excluded by the 90% rule (95.2% of the total minority population), only 75.9% of the white population is excluded (E4, A125, 853). If the 90% rule results in this degree of exclusion, the co-signer requirement does so even to a greater extent (A851). This exclusionary result follows solely from the use of the 90% rule, and not, for example, from the price of Lefrak apartments. It was amply demonstrated at trial that persons with income insufficient to meet the 90% rule would be able to pay Lefrak's rents. (A127, 129-132; E7, A125, 856). Moreover, where it could be shown that persons with income below what the 90% rule requires were living in Lefrak apartments (as a result of a change in financial circumstances after the initial renting), their rent-paying ability appeared to match that of persons with much greater income (E8, 12, A335, 322-24).

In cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-1 et seq. ("Title VII") the courts have held that a showing of racial effect (variously known as racial

impact or discriminatory preference), without evidence of discriminatory motive, is sufficient to sustain a claim of violation of that Act. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In Griggs, the Supreme Court found that employment practices, innocently conceived, could operate as impermissible barriers to minority groups if those practices capitalized on the socially and economically inferior position of minority groups. 401 U.S. at 430. See also Johnson v. Pike Corp. of America, 332 F. Supp. 490, 496 (C.D. Calif. 1971)

The Fair Housing Act is the analog of Title VII in the housing area. For this reason courts have found Title VII cases directly analogous and applicable to the interpretation of the Fair Housing Act. Logan v. Richard E. Carmack and Associates, 368 F. Supp. 121, 122 (E.D. Tenn. 1973); United States v. Grooms, 348 F. Supp. 1130, 1133-34 (M.D. Fla. 1972). Recently, this Court explicitly recognized the applicability of the racial effect principles developed in Griggs to housing discrimination cases. Olzman et al. v. Lake Hills Swim Club, 495 F. 2d 1331, 1340 (2nd Cir. 1974).

Racial effect or discriminatory preference is said to be shown when a "disproportionate percentage" of minority group members compared to whites are barred from employment opportunity by a particular practice. Johnson v. Pike Corp. of America, supra at 494. Discriminatory preference is not total exclusion. So, for example, in Hicks v. Crown Zellenbach Corp., 319 F. Supp. 314 (E.D. La. 1970), the practice of giving a battery of objective tests to employees was found to have created a discriminatory preference where it was shown that on one test, 37.3% of the whites

passed and only 9.8% of the blacks, and on another test, 64.9% of whites passed and only 15.4% of blacks. See also Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972).

In Johnson v. Pike Corp. of America, supra, a discriminatory preference was found in the practice of discharging employees whose wages were subjected to repeated garnishments. The Court there recognized that wage garnishments are most frequently suffered by the poor and that minorities are disproportionately represented in that category. See also Wallace v. Debron, 494 F 2d 674 (8th Cir. 1974). In Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Calif. 1970), a discriminatory preference was found in the practice of refusing to hire those with more than one arrest since minority groups are excluded in greater numbers than whites.

In Title VII cases involving racial effect, discriminatory motive has been an unnecessary or incidental factor to be considered. In Griggs the employer had ceased overt discrimination prior to the effective date of Title VII and had since taken steps to remedy the effect of that discrimination. In Johnson and Gregory, the employers hired large numbers of minority group members and were not accused of any past or present motive to to discriminate. United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2nd Cir. 1971) concerned only past discrimination which ceased prior to that litigation and therefore established no precedent for cases of present discrimination.

Nor is overt or motivated discrimination a prerequisite to the application of the Fair Housing Act. In Olzman v. Lake Hills

Swim Club, supra, a housing discrimination case, this Court reversed a summary judgment granted to defendant by the lower court because the practice complained of was "facially neutral". The Court held:

> . . .[W]e are far short of the analysis we are called upon to make by a number of cases (Cf. Griggs v. Duke Power Co., 401 U.S. 424. . . (1972)[Title VII]; Carter v. Callagher, 452 F. 2d 315 [8th Cir. 1971], modified on other grounds, 452 F. 2d 327 [en banc], cert. denied, 406 U.S. 950. . .(1972)[Section 1981]. 495 F. 2d at 1340-41.

And the Court went on to specifically approve, in the absence of overt discrimination, the applicability of the racial effect principle as developed in Griggs; and, further, found that a showing of motivation in the discriminatory practice was a separate and distinct basis for a finding of discrimination. 495 F. 2d at 1341.

No court construing Title VII or the Fair Housing Act has ever held as appellants contend, that all those statutes require is the treatment of every person alike. What those statutes require is equality of opportunity which under our Constitution results from the like treatment of all persons similarly situated. In Griggs, the Court said:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has - to resort again to the fable - provided that the vessel be one all seekers can use.
> 401 U.S. at 431.

So, in United States v. Grooms, supra, a requirement applied to everyone was found to be in violation of the Fair Housing Act because blacks were less likely to meet the requirement than whites. See also Olzman v. Lake Hills Swim Club, Inc., supra.

A separate issue in this case was Lefrak's practice, predating the amendment to the consent decree, of blanket exclusion of public assistance recipients because of a fear of maintenance problems (A847). Appellees claimed that this, too, was a violation of the Fair Housing Act. 77% of all public assistance recipients are black and Puerto Rican (A845). Clearly, the most prominent characteristic of the class of public assistance recipients is ethnicity. Welfare recipiency, therefore, must be seen as the "functional equivalent" of race. Cf. Robinson v. Lorillard Corp., 444 F. 2d 791, 797 (5th Cir. 1971). Blanket exclusion of public assistance recipients for the reason advanced is so "freighted with all the trademarks of racial prejudice" that one may well conclude that a discriminatory motive underlay the practice. Stevens v. Dobs, Inc., 483 F. 2d 82, 84 (4th Cir. 1973). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973).

Both the 90% rule and the blanket exclusion exclude all public assistance recipients. As to appellees' argument that these practices violate the Fair Housing Act because of this effect on recipients, appellants point out that some public assistance recipients are white. The Court in Johnson v. Pike Corp. of America, supra, commented:

> It may be that among persons of the same economic scale the wages of members of minority groups are garnished no more

> frequently than the wages of whites. . . . [I]t seems clear that the question is immaterial. The Supreme Court, in Griggs, repeatedly stressed that Congress' intention in Title VII was to invalidate all employment practices which in their final effect or consequence discriminate against racial minorities. 332 F. Supp. at 495.

Appellants cite Male v. Crossroads Associates, 469 F.2d 616, 622 (2nd Cir. 1972) and Colon v. Tompkins Square Neighbors, Inc. 294 F. Supp, 134, 138 (S.D.N.Y., 1968), as cases upholding a landlord's right to refuse to rent to individuals who cannot afford their rentals. In each of those cases it was held that a public assistance recipient's ability to pay rent was determined by the Welfare Department's willingness to approve shelter allowances, and the landlord's practices which failed to take this consideration into account (like those of appellants) were found to be arbitrary and irrational in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Male v. Crossroads Associates, supra at 622; Colon v. Tompkins Square Neighbors, Inc., supra at 138.

As has been shown, appellants' disclaimer of past discrimination and discriminatory motive, and their claim that they rented apartments to blacks, are essentially irrelevant to this action. The Court below properly found that appellants' financial criteria, the 90% rule and the co-signer requirement, had a racial effect, and operated as "built-in headwinds" for minority groups, and did not err in holding those practices to be in violation of the Fair Housing Act.

POINT II

APPELLANTS FAILED TO SHOW THE "BUSINESS NECESSITY" OF THEIR RENTAL PRACTICES THAT VIOLATED THE FAIR HOUSING ACT.

In Griggs v. Duke Power Company, supra, the Supreme Court held that barriers to equal employment opportunity are not violations of Title VII if they can be justified by business necessity, and if they bear a demonstrable relationship to successful job performance. Justification by business necessity is a principle applicable to housing discrimination cases. Olzman v. Lake Hills Swim Club, Inc., supra at 1341. In United States v. Bethlehem Steel Corporation, supra at 662, this Court stated that: "Necessity connotes an irresistible demand". The Court in Robinson v. Lorillard Corp., supra at 799, elaborated on this rule:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact [footnote omitted]; the challenged practice must effectively carry out the business purpose it is alleged to serve [footnote omitted]; and there must be available no acceptable alternative policies or practices which would better accomplish it equally well with a lesser differential racial impact.

In this regard, even inconvenience and expense are not considerations to be taken into account. Johnson v. Pike Corp. of America, supra at 495.

Once the racial effect of appellants' practices had been demonstrated, the burden of proving the business necessity of those practices shifted to appellants. Johnson v. Pike Corp. of

America, supra at 495. See also Olzman et. al. v. Lake Hills Swim Club, Inc., supra at 1341. The proof offered by appellants fell far short of demonstrating business necessity.[27] Dr. Tobier testified that he thought the rule of thumb was "reasonable" and that the 90% rule was its equivalent; but, gave no reason to support his opinion other than that it had been the rule of the real estate industry for a long time (A598, 635, 648). Mr. Starr, whose qualifications as an expert were challenged, offered his opinion that if a tenant paid more than 25% of his income for rent he would present a risk to his landlord, but was unable to show any reliable basis for his opinion (A658-59, 661,663,665, 681-683). None of the evidence introduced by appellants demonstrated the "irresistible demand" of the 90% rule or its relationship to rent-paying ability.

Dr. Bickel, an economist and appellees' witness, testified that he found the 90% rule to be so stringent and so severe that he could see no justification for it (A127). (Dr. Tobier admitted that in forming his opinion of the reasonableness of the 90% rule, he had made no study of the way the rule was actually used by Lefrak or of its exclusionary effect [A648]). Further, Dr. Bickel testified that another method of measuring rent-paying ability could be devised which would be less severe and exclusion-

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27. The reason now offered (Brief, p23) i.e., the additional expense of repair, repainting, reletting and legal fees upon default, was not offered or proved at trial. In addition, such a reason would not be sufficient to demonstrate business necessity. Male v. Crossroads Associates, supra at 623, n 7. See also Johnson v. Pike Corp. of America, supra at 495.

ary in its impact and still assure rent payment[28] (A132).

Statistical evidence was introduced by appellees that contradicted appellants' claim that either the 90% rule or the rule of thumb were in general use in the real estate industry in New York City. In 1970, fully 50.5% of New York City renter-households had rent-income ratios exceeding the 90% rule and 39.1% exceeded the rule of thumb (E7, A125).

As to public assistance recipients, neither appellants' blanket exclusion policy nor financial criteria could be shown to have any relevancy to the ability or qualifications of a recipient to be a good tenant.

In Male v. Crossroads Associates, supra, this Court considered a rental policy which excluded recipients because they did not have income sufficient to meet the landlord's financial requirements. The Court noted that the local welfare department regularly approved shelter allowances in the amount of the landlord's rentals:

> The [defendants]. . . argue that they apply a uniform standard in approving or disapproving rental applications: ability to pay the rent. They urge that the justification for refusing to even consider welfare recipients is that the variance between the shelter allowance and the rent schedule at the Crossroads conclusively demonstrates that persons reliant upon public assistance would be unable to pay

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28. Dr. Bickel's testimony concerning an alternative method for determining rent-paying ability was based on his adaptation of a formula, devised for this purpose by the Rand Institute, specifically to deal with Lefrak's rentals and occupancy standards (A127, 129-131). Appellants' objection to this portion of Dr. Bickel's testimony is therefore without merit (Brief pp. 23-24).

> the rents charged for the Crossroads apartments. We agree that there is no requirement that welfare recipients, or any other individuals, may secure apartments.. .without regard to their ability to pay. ... The seeming rational relationship between the sought-after-objective-ability to pay-and the classification imposed - welfare status-fails when excess shelter allowances, which could have been available here, are considered. 469 F. 2d 622.

Exclusions of public assistance recipients because of fear of maintenance problems and because of inability to obtain co-signers of their leases have also been found to be invalid. Colon v. Tompkins Square Neighbors, supra; Battle v. Municipal Housing Authority, 53 F.R.D. 423 (S.D.N.Y. 1971). Male, Colon and Battle all held that the only reasonable means to measure the rent-paying ability of public assistance recipients was by the willingness of the Welfare Department to approve shelter allowances in the amount of the rentals. With reference to these three cases, it should be noted that the rental practices at issue were found to be in violation of the Equal Protection Clause of the Fourteenth Amendment under the rational relationship test. That test is clearly less severe than the business necessity test applicable here.

In Finkrilakis, et al. v. The Secretary of the Department of Housing and Urban Development, supra, the Court declared invalid and enjoined a federal rule applied to federally assisted ("§236") housing which required a rent-income ratio of 35% for admission to such housing. The rule had been promulgated to ensure the rent-paying ability of tenants in the projects. The

Court found that the rule bore absolutely no relationship to the rent-paying ability of public assistance recipients and other low-income families:

> As applied to low income families the formula so distorts the true economic picture of the applicant's financial status as to be without relation to his ability to pay rent. 357 F. Supp. at 551.

In particular, the Court objected to the failure to take into consideration non-cash income (a failure shared by the 90% rule), and

> The most telling condemnation of the use of this formula is that many families. . . are paying comparable rents. . . and living in run-down inadequate housing. 357 F. Supp. at 552.[29]

Appellants failed to sustain their burden of proving the business necessity of their rental practices; and, therefore, the Court below did not err in finding a violation of the Fair Housing Act.

POINT III

THE COURT BELOW DID NOT ERR IN ITS FINDING OF A VIOLATION OF THE CIVIL RIGHTS ACT OF 1866.

Appellants contend that the Civil Rights Act of 1866, 42 U.S.C. §1982, applies only to "racially motivated" actions that discriminate in the sale or rental of housing. This Court has recently held that the statute does not apply solely to racially motivated acts of discrimination, but also to acts that have a

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29. Of course, a 35% rule is less stringent than a 20% rule (the equivalent of the 90% rule). This Court may take notice that even with the deductions taken to arrive at the rent-income ratio at issue in Findrilakis, the rule there would still be less stringent than the 90% rule.

racial effect, even in the absence of discriminatory motive. Olzman v. Lake Hills Swim Club, Inc., supra at 1340. 42 U.S.C. §1982's companion statute, 42 U.S.C. §1981, has been similarly interpreted. See e.g., Carter v. Gallagher, 452 F. 2d 315, 323 (8th Cir. 1971), modified en banc 452 F. 2d 327 (8th Cir. 1972), cert. denied 406 U.S. 950 (1972); Arrington v. Massachusetts Bay Transportation Authority, 306 F. Supp. 1355 (D. Mass. 1969).

Therefore, the Court below did not err in finding a violation of the Civil Rights Act of 1866 in the racial effect of appellants' practices; and, no showing of racial motivation was necessary. Cf. Jones v. Mayer Co., 329 U.S. 409 (1968).

POINT IV

THE COURT BELOW DID NOT ERR IN FINDING THAT APPELLANTS WERE IN VIOLATION OF THE FAIR HOUSING ACT AND THE CIVIL RIGHTS ACT OF 1866 IN THAT EXPERT TESTIMONY AND STATISTICS UPON WHICH IT BASED ITS FINDINGS WERE RELEVANT AND ADMISSIBLE.

Appellants argue that evidence adduced through appellees' expert witnesses, Dr. Bickel and Dr. Indik, was irrelevant and consequently inadmissible; that Dr. Indik's testimony was hearsay and inadmissible; and, therefore, the Court below erred in making findings of fact based on that evidence. Appellees contend that the evidence in question was fully relevant and admissible and the Court below did not err in relying upon it; and further that appellants' failure to make timely objections to the evidence constituted a waiver of their objections.

A. Appellants' Failure to Make Timely Objections Constituted a Waiver of Their Objections

1. Testimony of Dr. Bickel

To be timely, an objection to evidence must be made at the time that evidence is introduced. McCormick, Law of Evidence, §52, p. 115 (1971 ed.). As to the testimony of Dr. Bickel appellants made no objection until the direct testimony was nearly concluded, at which time a motion to strike on the ground of relevancy was made (A115-116). A motion to strike made after testimony, where an objection could earlier have been made, is properly denied. McCurdy v. United States, 246 F. 2d 67, 68, (5th Cir. 1957), cert. denied, 355 U.S. 933 (1958); Greene v. New York Central R. Co., 209 F. 2d 348, 349 (6th Cir. 1953). It is submitted that appellants' objection to the relevancy of Dr. Bickel's testimony was not timely, and therefore that objection was waived.

2. Testimony of Dr. Indik

Appellants argue that all of Dr. Indik's findings are based on hearsay because "his random study of welfare recipients was received from the Human Resources Administration" (Brief p. 37). No objection of this nature was made by appellants at any time during the trial. It is well-established that when objectionable evidence is admitted without timely objection, that evidence may be considered by the trial court. Diaz v. United States, 223 U.S. 442, 450 (1912).

Further, no findings by the Court below were based upon the testimony of Dr. Indik which derived from his study of the random sample of recipients. The findings to which this Court's attention is directed (A851,852)[30] were based on testimony concerning a

30. The finding that 80.7% of public assistance recipients live in segregated poverty areas was based on an official report of the City of New York of which judicial notice was taken (Exhibit 3, record, A11).

study made by George Sternlieb, with whom Dr. Indik was associated, and published as the Urban Housing Dilemma (A402, 413, 416). No objection to this testimony was made except as to relevancy (discussed infra).[31]

B. The Evidence Here Challenged Was Relevant and Admissible

In a non-jury case, the rules of evidence on the question of admissibility are liberally applied. United States v. E. Regensburg & Sons, 124 S.Fupp. 687, 693 (S.D.N.Y. 1954), aff'd 221 F. 2d 336 (2nd Cir. 1955), cert. denied 350 U.S. 842 (1955). Questions of relevance are committed to the broad discretion of the trial judge, and absent a clear and prejudicial abuse of discretion, error will not be found. Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152,160 (5th Cir. 1971 en banc); Hawkins v. Missouri Pacific R. Co., 188 F.2d 348, 351-52 (8th Cir. 1951).

1. Testimony of Dr. Bickel

Appellants argue that the testimony of Dr. Bickel upon which the Court below relied in making certain findings of fact (A851, 852,853) was irrelevant because it did not relate to appellants' buildings and practices or to the class appellees represent (Brief, p. 33).

Dr. Bickel's direct testimony directly concerning two substantial and material issues relevant to this action, the racial effect of appellants' practices, and the reasonableness of the 90% rule. Dr. Bickel's testimony did not concern public assistance recipients except implicitly (A114).

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31 In any event the testimony would not have been hearsay. Courts regularly rely on statistical evidence without requiring each respondent in a statistical survey or sample to appear in court to testify. See, eg., Kennedy Park Homes Ass'n. v Lackawanna, 436 F.2d 108 (2nd Cir.1971) cert.denied 401 U.S.1010 (1971)

Dr. Bickel's testimony demonstrated that 95.2% of all blacks and Puerto Ricans in New York City were excluded by the operation of the 90% rule from renting Lefrak apartments; and, that everyone was excluded who earned less than $10,500 a year (A109, E4, A125). It follows: 1) that all public assistance recipients are excluded because their income is less than $10,500 a year (E1a, judicial notice taken, A8); and, 2) that public assistance recipients are among the 95.2% of blacks and Puerto Ricans excluded because 77% of public assistance recipients are black and Puerto Rican (Id). Thus, Dr. Bickel's testimony was relevant, if not conclusive, on the issue of the racial effect of appellants' practices, as measured by their impact on minority groups to which appellees belong.

Appellants have argued that none of Dr. Bickel's testimony was relevant because it had nothing to do with Lefrak's buildings or rental practices (Brief p.35). It is clear from the record that Dr. Bickel's testimony, and his underlying analysis, were based on Lefrak's buildings and rental practices. Dr. Bickel used a list of actual vacancies and rentals of Lefrak apartments (A12, 97,103), the actual occupancy standards of the appellants (A105), and Lefrak's actual practice regarding the 90% rule (A106). Appellants claim that Dr. Bickel did not take into consideration the racial makeup of the geographical areas in which Lefrak buildings are located, a fact brought out on cross-examination (A222,223), and not the subject of any objection at trial, which goes, of course, to the weight and sufficiency of the evidence

rather than its relevance.[32]

2. Testimony of Dr. Indik

Only two findings based on Dr. Indik's testimony were made by the Court below, that recipients lived in the oldest, most poorly maintained buildings in the City, and that their housing was segregated (A851,852). Appellants argue that the testimony and exhibits supporting these findings had nothing to do with appellants' buildings, and did not relate to the racial effect of the 90% rule (Brief p. 36).

It is basic that before an injunction may be issued by a federal court the plaintiff must demonstrate that irreparable harm will follow if relief is not granted. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-7 (1959). The irreparable harm in this action flowed from the continued relegation of public assistance recipients to the oldest, worst-maintained buildings that are, in addition, segregated. Banks v. Perk, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972), modified 473 F. 2d 910 (6th Cir. 1973).

An opportunity to rent a Lefrak apartment would permit recipients to escape their damaging and stigmatizing housing environment. Therefore Dr. Indik's testimony relief on by the Court below was relevant to the case at bar.

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32. Dr. Bickel testified that he knew where the buildings were located (A222), but had chosen to consider the effect of the 90% rule on the population of New York City, rather than on residents of a particular area, because Lefrak buildings are located in most of the boroughs of New York City and there is considerable mobility among boroughs (A292,293). Appellants never proved the relevancy of the racial makeup of the areas in question, and in fact, never even attempted to.

3. In the Absence of Prejudice to a Substantial Right, Error will not be Found in the Admission of Evidence.

It is well-established that no error will be found in a trial court's overruling an objection unless a substantial right is affected. Rule 61, Federal Rules of Civil Procedure; 7 Moore's Federal Practice ¶ 61.07(1)(1974 ed.) Appellants have failed to demonstrate that any substantial right of theirs was affected by the admission of evidence objected to as irrelevant.

To be sure, in a non-jury case, prejudice would be a rarety, for it is expected that the trial judge can weigh and consider the evidence and determine the relevancy of it without being prejudiced by the presence in the record of irrelevant evidence. 7 Moore's Federal Practice ¶61.07(3)(1974 ed.) Appellants had full opportunity to object to testimony and to cross-examine Dr. Bickel and Dr. Indik in order to persuade the Court below of the irrelevancy of their testimony. Since the relevancy of that testimony has been shown; and, in the absence of any affect on appellants' substantial rights by its admission, the Court below did not err.

C. Appellees' Expert Witnesses Were Competent to Testify as Expert Witnesses in this Case.

Appellants argue that appellees' expert witnesses were not competent to testify as expert witnesses in this case. The matter of the qualifications of an expert witness is committed to the sound discretion of the trial judge. Diesbourg v. Hazel-Atlas Glass Co., 176 F. 2d 410, 413 (3rd Cir. 1949). Moreover, the extent of an expert'sknowledge of the subject matter of his testimony goes to the weight rather than the admissibility of

his testimony. Allen v. First National Bank of Atlanta, 169 F. 2d 221, 224 (4th Cir. 1948).

1. Dr. Bickel

The only objection made by appellants to Dr. Bickel's competency as an expert witness occurred at the point when he was asked: "In your opinion, is the 90% rule reasonable?"[33] (A125) The reason given by appellants for their objection, as now, was that Dr. Bickel had never managed an apartment building.

Although appellants had the burden of proof to justify the 90% rule, their expert witnesses who testified on this question, Dr. Tobier, an economist, and Mr. Starr (whose qualifications were challenged), had no expertise in the management of apartment buildings (A581-82, 656-58). Further, appellants have failed to show how a lack of expertise in this area has any relevance to evidence in the field of economics and statistics. However, if there was relevant evidence available from apartment buildings managers to justify the 90% rule, appellants, who had the burden of proof, did not produce it.

Dr. Bickel's testimony on the reasonableness of the 90% rule was based on the demonstrable stringency of the rule and his careful study of a Rand Institute report, his analysis, as an expert

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33. Appellants state that Dr. Bickel's testimony was the only testimony offered by appellees on the reasonableness of the 90% rule (Brief, p.38). If such a statement is made to claim an effect on a substantial right to appellants, it is immaterial, because the burden of proof on that issue was on appellants (See Point II, infra).

economist and statistician, of the method and data of that report (an acknowledgedly reliable source in Dr. Bickel's field) and his application of certain relevant portions of that report to Lefrak buildings and rentals (A127-132). If Dr. Bickel had insufficient knowledge to form the opinion that the 90% rule was excessively stringent and to analyze and use the Rand report, then, appellees claim, that is a question that goes to the weight of the evidence, and not Dr. Bickel's competency to testify. Allen v. First National Bank of Atlanta, supra at 224.

2. Dr. Indik

No objection to the competency of Dr. Indik as an expert witness was made at trial; and, therefore, appellants contend that objection was waived.

As has already been observed, Dr. Indik's testimony was not on the subject of the effect of the 90% rule, but on the irreparable harm resulting from the continuation of the use of the 90% rule. Appellants admit that Dr. Indik's expertise is in the area of social issues (Brief, p. 38) and it was in that area that his testimony clearly fell. In addition, Dr. Indik was obviously highly qualified in the area of statistical methods (A396-399).

Dr. Indik testified that he had been associated with Professor George Sternlieb in the preparation of the study published as the Urban Housing Dilemma, that he had worked on data collection and analysis done for that study, and was intimately familiar with the results of that study as it applied to public assistance recipients, having used data from that study in his own book, The Ecology of Welfare (A402, 410-12). As has been stated,the

only findings of the Court below based on Dr. Indik's testimony concerned the data from the Urban Housing Dilemma. It is clear that Dr. Indik was competent to testify on that subject.

Therefore, the Court below did not err in relying on the testimony of appellees' expert witnesses.

POINT V

THE CLASS IS PROPERLY CONSTITUTED AND THE APPELLEES ARE REPRESENTATIVE OF THE CLASS

In their amended complaint, appellees sought to represent all public assistance recipients in New York City (A7a). Initially, the class in this action was determined by the Hon. Jack B. Weinstein as "all welfare recipients within the metropolitan area who may seek accommodations in buildings owned or operated by the Lefrak interests" (A67a). In the amended judgment Mr. Justice Clark slightly modified the definition of the class to: "all public assistance recipients within the New York Metropolitan Area who have sought or may seek to rent accommodations in the residential buildings owned or operated by the Lefrak interests"(A866). Appellants argue that the class, as so defined, was not properly constituted, with specific reference to the future aspect of the class; and, that appellees are not representative of the class.

Class action orders are committed to the discretion of the District Court, and are accorded "weighty deference" unless that discretion is improperly exercised. Yaffe v. Powers, 454 F. 2d 1362, 1365 (1st Cir. 1972). Rule 23 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if. . .
>
> (3) the claim or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

The class in this action is constituted under Rule 23(b)(2)(A66a).

Appellants complain that the creation of a future class in this action makes the class "floating, prospective, and subjective" and was therefore improper (Brief, p. 41).

In defining the class prospectively, Judge Weinstein set out his reasons as follows:

> The Court takes judicial notice of the fact that there is a serious housing crisis in the City of New York and that particularly for poor people the problem of getting adequate housing is a serious one. The Court takes judicial notice that there are many welfare people presently housed in inadequate facilities. . . and under conditions quite inadequate from their own point of view. The Court has no doubt that the class of people who need housing and would apply for this housing, were it available, is very great. (A59a-60a).

Classes in civil rights actions under Rule 23(b)(2) have regularly been defined prospectively as such definition is a

logical and necessary step toward ending discrimination and enforcing injunctions against discriminatory practices. Yaffe v. Powers, supra; Carr v. Conoco Plastics, Inc. 432 F. 2d 57 (5th Cir. 1970); Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F. 2d 648 (4th Cir. 1967); Singleton v. Board of Commissioners 56 F. 2d 771 (5th Cir. 1966). Indeed, it was expected that in civil rights class actions, the members of the class would be incapable of specific enumeration. See Advisory Committee's Notes, Rule 23, Federal Rules of Civil Procedure. Appellees contend, therefore, that the class herein was properly defined prospectively; and, further, that a prospective class is a necessary means for effectuating the judgment of the Court.

It has been held that the requirements for proper representation in a class action in which racial discrimination is at issue are that the named parties have suffered from the discriminatory practice in the past, and are subject to the practice in the future. Singleton v. Board of Commissioners, supra at 773 (cases cited). Thus, questions of adequate representation are fact questions left to the discretion of the trial judge. 3B Moore's Federal Practice ¶23.07 (2nd ed.1974).

The record is clear that both Mrs. Boyd and Ms. Stoney attempted to rent Lefrak apartments, and both were rejected because of Lefrak's discriminatory rental practices, Mrs. Boyd through a blanket exclusion, and Ms. Stoney through the applica-

tion of the financial criteria (A847,849).[34] As to Mrs. Boyd, there was evidence adduced that she would be likely to seek accommodations in Lefrak buildings in the future (A848). Thus, the requirement of past injury and future use was met.

It is generally held that in class actions under Rule 23(b)(2), one looks to the effect of the action complained of to determine who are properly members of the class and who may represent them. Yaffe v. Powers, supra at 1366; Carpenter v. Davis, 424 F. 2d 257, 260 (5th Cir. 1970). It has been shown that blacks and Puerto Ricans are disproportionately affected by the rental practices of appellants (A852-53). Mrs. Boyd and Ms. Stoney are black and are members of a class, public assistance recipients, which is predominantly black and Puerto Rican, and a substantial sub-class of those minority groups similarly affected by the rental practices of appellants (A845-46). The effect of those rental practices results from the shared characteristics of the larger class, all blacks and Puerto Ricans, and the sub-class, public assistance recipients. See United States v. Texas, 342 F. Supp. 24, 26 (E.D. Texas, 1971), aff'd 466 F. 2d 518 (5th Cir. 1972). Under those circumstances, a black person may properly represent members of other minority groups. Keyes v.

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34. Even if, arguendo, Mrs. Boyd had been rejected because of overoccupancy for the apartment she sought in July, 1971, clearly she would not have been rejected for all Lefrak apartments because of overoccupancy (there are apartments for six persons)(E299). But, the cause of her rejection was her status as a public assistance recipient and she was not offered an apartment of a different size.

School District No. 1, 413 U.S. 189, 197 (1973); Carter v. Gallagher, supra at 317. Therefore, if one looks to those affected by Lefrak's rental practices, it is clear that the class was properly defined, and the named plaintiffs representative. It would not matter that the class appellees represent is a sub-class of those affected by the rental practices at issue.[35] Rule 23(c)(4).

Lastly, there is no indication in the record below of any interests of the unnamed members of the class here that are antagonistic to or not properly represented by the named plaintiffs; nor, can it be said that the named plaintiffs did not vigorously prosecute this action. Cf. Carroll v. American Federation of Musicians, 372 F. 2d 155, 162 (2nd Cir. 1967).

In their argument, appellants take the principle of representation to the extreme (Brief. p. 40). They enumerate all the characteristics of Mrs. Boyd and Ms. Stoney known to them (However, Mrs. Boyd is married) and conclude that they may represent only persons possessing all those characteristics. Such an argument overlooks the fact that under Rule 23(b)(2) only certain individual characteristics are relevant, i.e., those that result in the named party's being affected in the same way as the unnamed parties. The operative factor is the action of the opposing

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35. The necessity of a sub-class flows from the different position of public assistance recipients from the larger class on the issue of the justification of Lefrak's rental practices.

party which makes injunctive and declaratory relief appropriate for the class as a whole. Here, that action was the rental practices of appellants. Those practices did not exclude Mrs. Boyd and Ms. Stoney because they were unmarried, lived in Brooklyn, or received ADC, but because of characteristics they possessed as members of a minority group and as public assistance recipients.

Therefore, the class herein was properly constituted and appellees are representative of that class.

POINT VI

THE COURT BELOW DID NOT ERR IN ADMITTING CERTAIN TESTIMONY OF MR. BURDICK.

Appellants argue that the admission into evidence of certain documentary evidence through Mr. Burdick, a witness for appellees, was harmful error in that the evidence supported a material finding by the Court below and its admission denied them their right to cross-examine an adverse witness. Appellees contend that the evidence in question was properly admitted under the business records exception to the hearsay rule, and under such circumstances appellants' cross-examination rights were not violated.

The documents at issue (E8, 12; A329) were lists of the number of public assistance recipients living in Lefrak apartments in November, 1972, and May, 1973 (A330-331). Mr. Burdick is the Director of the Income Maintenance Program of the City of New York, and at the time the lists were made was Deputy Director of the Income Maintenance Program of the City of New York (A312-313). He testified that records were kept by DSS under his super-

vision, and pursuant to the requirement of law, of the names and addresses of public assistance recipients (A315,316, 328). See New York Social Services Law §§80, 81. He further testified that these records were kept for regular purposes of DSS, and updated constantly (A316).

Mr. Burdick testified that he had been asked by the Assistant to the Director of DSS to ascertain the number of recipients living at addresses given to him by that individual (A327-328). The addresses were for Lefrak's buildings in New York City (A329). Mr. Burdick then supervised the collection of this information, by directing that the number of cases shown in DSS's regularly kept address file be added up, and compiled the lists (A328,330). Neither Mr. Burdick nor anyone supervised by him knew why the request for this information had been made other than that it had come from a superior in DSS (A328). No alteration or interpretation of the records took place when the lists were compiled (A328).

Quite obviously, Mr. Burdick was not a proper witness to be cross-examined since he himself did not make entries in the records from which the lists were drawn and did not know the names of or any other facts about the recipients involved. He could only testify, as the person in charge of those records, (as he did) as to how the records were kept. The only witnesses who could conceivably have been cross-examined were every clerk employed by DSS to make entries in those records, an impossibility.

Appellees sought to have the documents in question admitted under the business records exception to the hearsay rule, and argued that the documents represented records regularly kept by

DSS pursuant to the requirements of law, that there had been no interpretation or alteration of those records in producing the documents, and that there was a total absence of any motive to be inaccurate; all of which rendered the documents reliable and admissible (A318-321). Taylor v. B.& O. Railroad Co., 344 F. 2d 281, 286 (2nd Cir. 1965); Hoffman v. Palmer, 129 F. 2d 976, 991 (2nd Cir. 1942), aff'd 318 U.S. 109 (1943). See also U.S. v. Meyer, 113 F. 2d 387, 397 (7th Cir. 1940), cert denied 311 U.S. 706 (1940); Chesapeake and Delaware Canal Co. v. U.S., 250 U.S. 123 (1919)). There was never any dispute that the records from which the lists were drawn were too voluminous to bring to Court, or that the lists were inaccurate (A321).

After hearing argument concerning the admission of these documents, the Court below directed that they be admitted as "a very accurate list of the number [of recipients] that are in your apartments. She is not able to get it anywhere else"(A324). Appellants claim, however, that they needed the names of the recipients represented on the lists, information which Mr. Burdick refused to make available to them. The identity of public assistance recipients is protected from disclosure to persons not directly involved in the administration of the public assistance programs. Social Security Act, 42 U.S. C §602(a)(9); New York Social Services Law §136; 18 N.Y.C.R.R., Part 357. It was on this statutory requirement of confidentiality that Mr. Burdick based his refusal to reveal the names of the recipients represented onthe lists (A334,343). Public assistance records are not public records. Turner v. Barbaro, 56 Misc. 2d 53 (Nassau 1967),

aff'd 31 A.D. 2d 786 (2nd Dept. 1969), and are barred from disclosure in discovery or judicial proceedings. Id; Application of Minicozzi, 51 Misc. 2d 595, 596 (Suffolk 1966).

One exception to the requirement of confidentiality, not applicable here, arises when a recipient gives an informed consent to waiver of confidentiality in special circumstances. Kelly v. Wasserman, 5 N.Y. 2d 425 (1959). In Kelly v. Wasserman, the portions of the case record of the plaintiff, maintained by DSS, were excluded by the lower court on the ground that they were hearsay. The Court of Appeals found that the portions of the case record, introduced through an individual who was in charge of the record but who had not made the disputed entries, qualified under the business records exception to the hearsay rule. 5 N.Y. 2d at 428. As to the objection that the admission of the record was a denial of the right to cross-examine, the Court said:

> It is true that the person who made the memoranda, since not testifying, could not be cross-examined. Nevertheless, in Johnson v. Lutz, 253 N.Y. 124. . ., we said that, where the entrant has the duty of drawing the memoranda, section 374-a(CPA, now R45 18(a), CPLR] permits it to be received in evidence without the necessity of calling as witnesses all of the persons who had any part in making it.
> 5 N.Y. 2d at 429.

The Court further held that questions directed to the credibility to be assigned to the records raised considerations of the weight to be given them, and not their admission. 5 N.Y. 2d at 436.

Appellees submit that Kelly v. Wasserman, supra, is controlling on the issue raised by appellants. Appellants' objections to the admission of the documents in question, that they could

not learn the names of the recipients, the number of person in each case listed, or the length of their tenancy, are clearly directed to the weight and sufficiency of this evidence and not its admissibility. Nor, have appellants shown that they were harmed by the admission into evidence of the number of recipients, and not their names. Such information was in the possession of appellants inasmuch as the recipients on the lists were tenants of theirs. Further, that appellants did not know the identity of the recipients (A322) (and therefore, that they were a problem) undercuts their claim that such information was relevant and necessary to their case.[36] And, thus, the case at bar is within the holding of Summit Drilling Corp. v. Commissioner of Internal Revenue, 160 F. 2d 703 (10th Cir. 1947), relied on by appellants, in that disclosure of the confidential information would not have altered the conclusions drawn from the testimony based upon it.

Therefore, the evidence in question was properly admitted, and no harmful error was committed in its admission by the Court below.

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36. As to one objection of appellants, that the recipients on the list could have been in default in rent payments or actually evicted, it was revealed that appellants would not allow anyone to remain in their buildings without paying rent more than three months and the lists were made six months apart and the number of recipients had grown, not diminished (A326-327).

POINT VII

THE COURT BELOW DID NOT ERR ADMITTING INTO EVIDENCE A DOCUMENT ON THE RACIAL MIX OF APPELLANTS' BUILDINGS.

Appellants argue that the finding of the Court below relevant to the ethnicity of their buildings (A855) was based on a hearsay document not qualified under the rules of evidence (E27; A524). In particular, appellants complain that a proper foundation for the introduction of the document was not laid. Appellees contend that the document in question was properly admitted under the business records exception to the hearsay rule.

In 1969, the New York City Human Rights Commission (the City's anti-discrimination agency)[37] conducted a survey of Lefrak buildings in Brooklyn. There can be no dispute that such a study was done (E306; A775, introduced by appellants). In 1970, after the commencement of the Government's suit, the defendants there (appellants and others) required in discovery proceedings the production of certain evidence relied upon by the Government. A study, purported to be the Human Rights Commission study, was produced and filed in that case (A762-765). At the time of the trial in this action, the study was contained in the court file of the Government's suit (A765).

The questions concerning the admission of this document are these: 1) was the study done in the regular course of the Commission's business (no one doubts it was done)?; and 2) if so, is the copy appearing in the court file of the Government's suit a copy of the study done by the Human Rights Commission in 1969?

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37. New York City Administrative Code, §B1-3.0

At the outset, it should be noted that each page of the document is marked with the name and address of the Commission, the form number, "CCHD-1", and each segment of the document is marked received on various dates in early 1969 (E27-104, A774).

Pursuant to subpoena duces tecum, Mr. Topper, an attorney for the Human Rights Commission, appeared as a witness to lay the foundation for the introduction of this document (A780). Mr. Topper testified that the forms on which the study was done were the Commission's forms (A780), that the Commission has been doing studies of buildings and landlords and racial and ethnic compositions of those buildings using those forms since 1968, and that such studies are still being done (A780-781), and that they are done regularly, not with respect to any particular complaint[38] (A781). Further, Mr. Topper testified that the records of the Commission showed that the study was done by a head of the Housing Commission in the agency, that he had found these records in the Housing Department's files termed "Lefrak", and that an internal memorandum dated August 7, 1970, contained in the records, stated that the study had been done, how it had been done, and then that it had been sent to the United States Department of Justice (A781, 784-786).

Appellees submit that the Commission study, therefore, was properly admitted under the business records exception to the hearsay rule. 28 U.S.C. §1732; New York Civil Practice Law and Rules R. 4518. In introducing such documents it is not necessary that the witness have prepared them himself, but only that he be

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38. New York City Administrative Code §§ B1-5.0(4).

sufficiently familiar with the business practice to testify that the records were made as part of that practice. United States v. Rosenstein, 474 F. 2d 705, 710 (2nd Cir. 1973). The documents here were adequately shown to have been prepared pursuant to a duty imposed on the maker and as part of a regular business activity. Johnson v. Lutz, 253 N.Y. 124, 128 (1930).

The remaining question is whether the study appearing in the court file was the study done by the Commission. In this case, appellees submit that the markings borne by the document, the Commission memorandum reporting on the preparation of the study and stating that the completed study had been given to the United States Department of Justice, its appearance in the court file under the circumstances related, together with appellants' acknowledgment that the study had been done, are sufficient for authentication, without more, and a proper foundation was laid for its introduction

Therefore, the Court below did not err in admitting into evidence the Commission study.

CONCLUSION

Appellees respectfully request that the amended judgment of the Court below be affirmed.

Dated: August 28, 1974
New York, New York

Respectfully submitted,

Ruth Balen, of counsel
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AFFIRMATION OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

RUTH BALEN, an attorney duly admitted to practice in the Courts of New York State, affirms under penalties of perjury:

That on the 28th day of August, 1974, deponent served the within Appellees' Brief upon Goldstein, Shames & Hyde, Edward Brodsky, of counsel, attorneys for appellants in this action, at 655 Madison Avenue, New York, New York, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States post office department within the State of New York.

Dated: August 28, 1974
New York, New York

Ruth Balen

RUTH BALEN